



REPUBLIC OF NAMIBIA

OFFICE OF THE ATTORNEY-GENERAL

BUDGET PRESENTATION

2017/2018

NATIONAL ASSEMBLY

FOREWORD

The purpose of this document is to provide the reader with the budget forecast for the Office of the Attorney-General for the 2017/2018. In doing so it is necessary to provide sufficient information to place the reader in a position to comprehend the figures.

The Prosecutor-General, the Government-Attorney and the Chief: Legal Advice, and their respective staff have diligently worked to ensure that this publication is on time, and for all their efforts, I would like to use this opportunity to thank them.

Once we have received the public finances for which I will request in the National Assembly, the motto is one loud clarion: **Hard work, Hard work and Hard work NOW!**



**MR. SAKEUS E.T. SHANGHALA, MP
ATTORNEY-GENERAL**

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REPUBLIC OF NAMIBIA

Motivation of Vote 35 as Delivered by the Attorney-General of the Republic of Namibia

April 19, 2017

National Assembly

Honourable Madam Deputy-Speaker,

1. Last week, His Excellency the President, Dr. Hage G. Geingob delivered his third State of the Nation Address to a joint sitting of the National Assembly and the National Council, he did so with such clarity in expression, stately demeanor, impeccable content and as remarked by the Speaker himself, a rare display of an individual's love for the Namibian Nation. I therefore want to commence the motivation for Vote 35 with a tribute to not only the President, but also others, to that generation that dared to dream of a free and independent Namibia, governed under the principles of *solidarity, freedom and justice*.
2. Indeed, the generation I speak of outperformed itself in its wildest dreams. Here we are, lawmakers in an independent Namibia, representatives of the people, duly elected on Party Lists, under one Constitution, one President, even though we all know that he is also the SWAPO Party President *de facto*, and the irrelevant side shows about him being acting President of SWAPO Party notwithstanding, we have no leadership vacuum. This generation has bequeathed us freedom. Even the freedom to disrespect our elders as young Africans. As I stand before this August House, I ponder what it will be, that we bequeath our children? Will we consolidate the gains of Independence? Will we *push the envelope* as it were, or will languish with content?
3. Will our sense of entitlement accomplish any deliverables? Or will we be ignored, overtaken, trampled upon, by the generations behind us to wipe out our shameful existence in wanton

afro pessimism, political and social delusions of grandeur, not to mention our eagerness to the niceties and pleasantries of the first world at whatever cost? I ponder these questions quite frequently, as I look to the future. I am some months older than the leader of the Official Opposition. Yet, if I can judge from our interactions in this August House, I can sum them as general fiery philippic disguised as academic retort to any proposal or action from this side of the isle. Do we add any value to governance? Perhaps some of these questions, or at least similar misgivings are what drew David Keig to write this verse in one of his poems:

I dreamt I saw a perfect world;

A perfect world did see;

But it could not be perfect;

As it included me.

Madam Deputy-Speaker,

4. With those self-reflective concerns in my mind, I recall my first motivation of Vote 35 on May 7, 2015 wherein I said the following if you will permit me to quote myself:

In accordance with the oath of office I have taken, I will endeavor to work to ensure that we protect, promote and uphold the Namibian Constitution in assisting the President and Government achieve and fulfill the mandate given to the SWAPO Party by the Namibian people, for the benefit of all. This will be my *leitmotif*.
5. I remain humbled by the confidence and trust bestowed upon me by the President who saw it fit to appoint me as the Attorney-General. Like all other appointees, I serve at his pleasure and will endeavor to live up to the above pledge I made in 2015. Permit me to also thank the Minister of Finance and his team for some consideration for our needs as Vote 35, which comprises the Attorney-General, the Prosecutor-General, the Government Attorney and the staff that support our work. That having been said however, it is important that I sound the warning that for some of our Offices and functions, we are too embedded in the justice system to be starved of

funding. Our inabilities and abilities impact the justice system directly and without an effective and efficient legal response from the Attorney-General, the Prosecutor-General, the Government Attorney or the Chief: Legal Advice, we will be negating a lot from our governance under this Rule of Law system we as a people have chosen for our Republic.

6. Vote 35 has five (5) Main Divisions under which the total appropriation request of N\$ 240 '734 '000.00 (Two Hundred and Forty Million, Seven Hundred and Thirty-Four Thousand Namibia Dollars) would be utilized. I will now discuss each Main Division in relation to its work and the respective appropriation request before this August House.

7. **Main Division 01** is the **Office of the Attorney-General**, the ministerial component proper, and with only 3 persons on the establishment, including myself, the appropriation request is only N\$ 4'361'000.00 (Four Million, Three Hundred and Sixty-One Thousand Namibia Dollars). Needless to state, the functions of the Attorney-General, the existence of the portfolio of Attorney-General, are constitutional matters. The Attorney-General though, along with the Prosecutor-General and the Auditor-General, remain as the only constitutional offices without legislation to govern their functions, although the Auditor-General is mentioned in the State Finance Act, 1991 (Act No. 31 of 1991). The Prime Minister's powers are articulated in the Public Service Act, 1995 (Act No. 13 of 1995), the Anti-Corruption Commission, the Ombudsman, the Judiciary, the Namibian Police, Namibian Defence Force, the Director-General: National Planning, the Director-General: Intelligence Service, Central Bank, Correctional Services, Electoral Commission of Namibia and so forth. We will therefore commence the process of drafting our legislation in the fullness of time.

8. **Main Division 02** is the **Administration and Support Service** component. It is not yet populated when the separation in budget votes took place with the Ministry

of Justice, Vote 16. So far, there are only three persons appointed. Ideally, this component would be headed by a Permanent Secretary, however, for now, Vote 35 and Vote 16 share one accounting officer, Mr. Issaskar Ndjoze. Hopefully the Prime Minister will give us a Deputy-Permanent Secretary to assist us in administration support. This is a very instrumental component which would assist us in accounting for our work and monies by preparing reports (accountability, quarterly, NDP performance sheets, Harambee Prosperity Plan performance indicators *etc.*) apart from other administrative functions in the normal realm of administration support services. An appropriation amount of N\$ 33 '787 '000.00 (Thirty-Three Million, Seven Hundred and Eighty-Seven Thousand Namibia Dollars) is sought.

9. **Main Division 03** is the **Provision of Legal Services** to the President and Government Offices/Ministries/Agencies (O/M/A's). This component sits closer to the Attorney-General than the other components, as staff in this Directorate support the Attorney-General in the performance of the constitutional functions and mandates therein prescribed. The establishment is occupied by 32 staff members as not all 41 posts were funded. This notwithstanding, we await the approval and funding of the new structure which will permit the Attorney-General to be in a position to post lawyers to the O/M/A's as secondary legal advisers while the Attorney-General remains the principal legal adviser to the President and Government. These lawyers would greatly assist the burden of fresh files and matters from O/M/A's as we have seen with the Ministry of Environment and Tourism where we have placed a lawyer, as well as the Ministry of Health and Social Services where we have placed two lawyers on their establishment. We are eager to decentralize and place lawyers and support staff at the High Court Oshakati Division, however, once we get the posts funded, we would be back for another request for accommodation for these staff members.

Honourable Members,

10. We have really seen an increase in requests for legal advice. Sometimes, it would be a similar request from 3 or more O/M/A's, and hence we have been publishing Frequently Asked Legal Questions (FAQL's) which are hopefully being distributed to you. In there we have generalized opinions that need to be out in the public realm for the benefit of not only the GRN O/M/A's, but also the general public. This year's will be the third edition of the FALQ's. N\$ 27 '731 '000.00 (Twenty-Seven Million, Seven Hundred and Thirty-One Thousand Namibia Dollars) is sought for Main Division 03.
11. **Main Division 04** is the **Civil Litigation Directorate** where we handle all litigation matters. Only 22 of the 44 positions are filled mainly because the establishment was not fully funded. We have also been occasioned by an increase in civil litigation matters against the State or O/M/A's, however, we have been able to keep consistency in ensuring that justice is done. Increases have been notable in immigration matters and I suspect that this is because Namibia was faring better than other SADC countries during the economic downturn of recent. Some people measure justice being served by the number of cases we win or lose. Whilst we do not hoist our flag every time we win matters, particularly in the Supreme Court, we are confident that the quality of the arguments we present to the Court not only enrich our jurisprudence, but we trust that they contribute to the education of our colleagues who are in the profession, particularly when they deal with specific areas of public law. A total appropriation amount of N\$ 76 '096 '000.00 (Seventy-Six Million, Ninety-Six Thousand Namibia Dollars) is sought with the appropriation of Vote 35 for this Main Division.
12. **Main Division 05** is the **Prosecutor-General** component under the theme **Public Prosecution**. The amount of N\$ 98 '759 '000.00 (Ninety-Eight Million, Seven Hundred and Fifty-Nine Thousand Namibia Dollars), being the largest allocation under Vote 35 is sought for prosecutorial functions. Indeed, of that amount, N\$ 93 '174 '000.00 (Ninety-Three Million, One Hundred and Seventy-Four Thousand Namibia Dollars) is dedicated to the personnel component. In other words, salaries.
13. Some explanation is required. Where ever there is a magistrate, there ought to be a prosecutor, if not two. So for 34 magisterial districts, with 37 periodical magistrate courts and 93 magistrates we need to have prosecutors there at the divisional and regional court levels. We have prosecutors at the High Court, both Divisions: Main Division and Oshakati Division. We have prosecutors who prosecute in the Supreme Court where required. Then we have responsibilities over and above the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The Anti-Corruption legislation, NBC legislation, Affirmative Action (Employment), stock theft, poaching and illegal hunting, traffic laws, cyber-crimes, child trafficking, other forms of organized crime such as money laundering and virtually every legislation emanating from this law making House imposes a prosecutorial function. 49 '822 (Forty-Nine Thousand, Eight Hundred and Twenty-Two) cases were dealt with in the magistracy, of which 15 '905 (Fifteen Thousand, Nine Hundred and Five) cases were finalized.
14. Factually, crimes have increased too, also from the perspective of the number of crimes now in existence as it is due to the commissions of offences. Therefore, allow me to inform you that we need more prosecutors. We need befitting Office infrastructure for the Prosecutor-General. I do not want to make comparisons per se, but the Anti-Corruption Commission, an important body no doubt, was recently created and it already has a building, the Namibian Constitution was amended to provide for its Director-General and Deputy Director-General, yet who prosecutes crime?
15. I earlier made a comment about the increase in litigation and cited immigration as an example. For prosecutions, there has been an increase in poaching and illegal hunting matters. We are in dire need of specializing in the prosecution of such

crimes, and I would be amiss if I did not use this platform to thank the World Wildlife Fund (WWF) for its ongoing support to prosecute these crimes. There has also been an increase in domestic violence matters, gruesomely so! Something needs to be done and we can prosecute all we want, however, whether it is drugs, mental health problems or otherwise, we see the numbers increasing. Once the statistics are compiled, I will share them with this August House. In that category I include baby dumping and really, it is time to have a discussion on the matter of abortion. It is already partially legal if there was a rape or there is the threat to the life of the mother, however, there is also a need for sex education for our young boys and girls who are making children while they themselves are children.

16. Cyber law generally in Namibia is behind when it comes to the abuse of the World Wide Web and there is a need to specialize prosecutors and other lawyers in this area. The same can be said for environmental matters which have also been steadily increasing whether prosecution or mere litigation. The same for money laundering matters which have both a criminal and a civil dimension, particularly if regard is had to asset forfeiture. In regard to asset forfeiture, we were successful in placing N\$ 26 '236 '386.80 (Twenty-Six Million, Two Hundred and Thirty-Six Thousand, Three Hundred and Eighty-Six Namibia Dollars, Eighty Cents) worth of assets under preservation orders from the High Court, while the Asset Forfeiture Fund stands at N\$ 50 '000 '000.00 (Fifty Million Namibia Dollars).

17. Back to the increase in litigation, let me advise this August House that there is litigation ongoing in the High Court based on alleged claims over vast ancestral lands. Of course we are defending such, and while on this point, I would like to echo the sentiments of the President which he made during the 2017 State of the Nation Address last week. We need to be very careful throwing terminologies around. Preparing for this case has exhibited to me the magnitude of the problem with ancestral land claims, notwithstanding what other jurisdictions may have determined through their courts – I speak in relation to the Republic of Namibia. It will be a

very difficult matter, particularly when some communities have overtaken the discussion and brought it before the Courts, let alone the Land Conference envisaged? How will the two inter play? I wonder.

18. I will refrain from citing too many statistics as I have provided some analysis of our performance printed in this booklet. The same goes for the main cases that were dealt with during the period under review. Short summaries are attached for your ease of reference.

19. Having stated the above, I now seek your indulgence and support for the appropriation amount of N\$ 240 '734 '000.00 (Two Hundred and Forty Million, Seven Hundred and Thirty-Four Thousand Namibia Dollars).

I thank you.

Per Sakeus E. T. Shanghala, MP
Attorney-General

1. **The Role of the Office of the Attorney-General**

1.1 The Attorney-General of Namibia is appointed by the President by virtue of Article 86 of the Namibian Constitution. The powers and functions of the Attorney-General, in terms of Article 87 of the Namibian Constitution, are:

- “(a) To exercise the final responsibility of the Office of the Prosecutor General;
- (b) To be the principal legal adviser to the President and Government;
- (c) To take all action necessary for the protection and upholding of the Namibian Constitution; and
- (d) To perform all such functions and duties as may be assigned to the Attorney-General by Act of Parliament.”

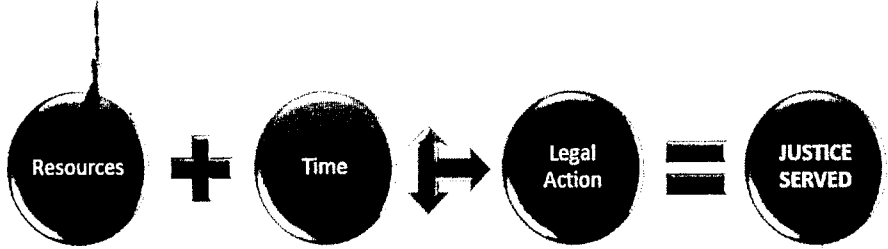
1.2 In the exercise of his functions, the Attorney-General is bound by his/her Constitutional duty to protect and uphold the Namibian Constitution, a duty he/she must observe as he/she exercises all other duties bestowed upon him/her.

1.3 In framing the functions of the Attorney-General, the Namibian Constitution was deliberate in the use of the words “to take all action necessary for the protection and upholding of the Namibian Constitution”. The deliberate use of these words is intended to provide the Attorney-General with leeway, all within the ambit of the law, to not only uphold and protect the Constitution but to take all action necessary in the execution of that duty. The Attorney-General is the only person mentioned in the Namibian Constitution that is authorised to take all action necessary for the protection and upholding of the Namibian Constitution. Keeping this duty in mind one must consider the unique role of the Attorney-General.

1.4 In any other Office, Ministry or Agency one can measure the performance by comparing the resources and hours put into a project and the quality of the work which was delivered. The Office of the Attorney-General follows a more complex

equation. Although plenty of resources and time are put into a legal matter resulting in some form of legal action, be it in terms of prosecutions, litigation or legal advice, the only outcome on which the Office of the Attorney-General can be measured is whether justice has been served. This is an infinitely heavier burden than a simple calculation as to the outcome of legal action.

1.5 The statistics that follow are therefore an indication of how the time and resources allocated to the Office of the Attorney-General were utilized.



2. Statistics

2.1 The Office of the Attorney-General consists of the Directorate: Civil Litigation and the Directorate: Legal Advice. The Directorate: Civil Litigation deals with all matters emanating into litigation against and on behalf of all Government Offices/Ministries/Agencies (O/M/A's) whereas the Directorate: Legal Advice renders legal advice/opinions to O/M/A's.

2.2 The Office of the Prosecutor-General is part of the Office of the Attorney-General by virtue of Article 87(a) of the Namibian Constitution in terms of which the Attorney-General is to exercise final responsibility for the Office of the Prosecutor-General.

2.3 Directorate: Legal Advice

2.3.1 The process of rendering legal advice encompasses research, consultation with clients, scrutinizing relevant documents, application of the law, drafting of legal documents and legal opinions.

2.3.2 The Directorate of Legal Advice aims to provide quality and timely legal advice/opinions to its clients with a team of legal professionals and support administrative staff, who are qualified, vibrant, trained, motivated, intelligent, dedicated and who generally have the interest of the Namibian Government at heart at all times.

2.3.3 In summary, the Attorney-General's function in terms of Article 87(b) encompasses the following:

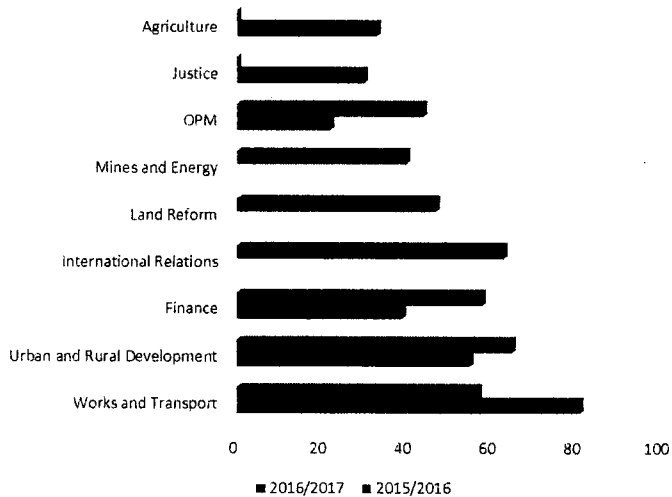
- (a) providing legal advice to the President and Government (O/M/A's) on any matter;
- (b) assisting O/M/A's in disciplinary hearings;
- (c) assisting O/M/A's in international, regional, and local negotiations;
- (d) scrutinizing documents including but not limited to agreements, contracts, bills and policies;
- (e) serving as members of various intergovernmental and inter-ministerial committees; and
- (f) providing training on various aspects of the law generally, and specifically on the application of certain (various) statutes to line ministries.

2.3.4 During the period 1 April 2016 to 31 March 2017 the Directorate of Legal Advice handled 985 files in total with only 27 lawyers. From the total files handled 886 files were legal opinions.

2.3.5 393 files of the total files handled by the Directorate of Legal Advice were of an administrative nature which relates to the functioning of the O/M/A's in terms of the action they are authorised to take under their founding legislation. It is important to note that the Attorney-General is the only constitutionally mentioned office in the Namibian Constitution which still remains without such instructive legislation.



Largest Client Ministries for Legal Advice



2.3.6 As can be seen from the chart above, the Ministry of Urban and Rural Development is the largest client of Office of the Attorney-General. The Ministry of International Relations and Cooperation is the second largest client.

2.3.7 During 2016/2017 several international law matters were handled by legal officers of which the most notable were Namibia's position on the International Criminal Court, Orange River Boundary negotiations, African Union Convention on Cross Border Cooperation discussions, the review of the Insolvency Act, 1986 (Act No. 24 of 1986) with UNCITRAL and ratification of Cultural, Scientific and Technical Cooperation Agreements with France.

2.3.8 The Office has also been highly involved in shaping the legal landscape. Lawyers have assisted the O/M/A's on the Draft Chemical Weapons (Prohibition) Bill; Namibian Arbitration Reform Project; Divorce Draft Bill; Uniform Default Marital

Regime Bill; and an amendment to the Controlled Wildlife Products and Trade Act, 2008 (Act No. 9 of 2008).

2.4 Directorate: Civil Litigation

2.4.1 The functions of the Government Attorney's Office are as provided for in section 4 of the Government Attorney's Proclamation, 1982 (Proclamation No. R161 of 1982) as amended.

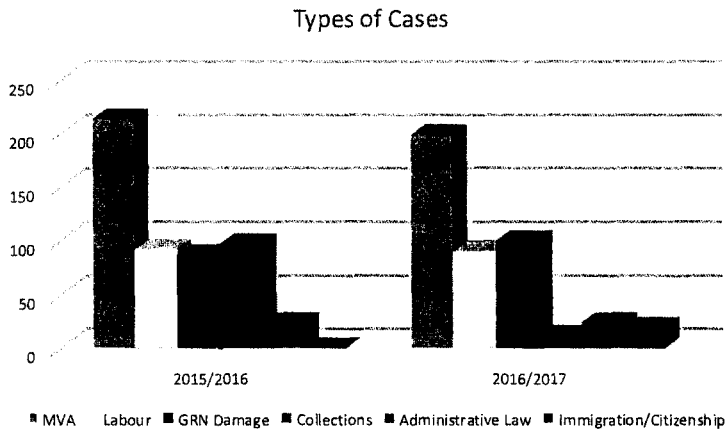
2.4.2 Directorate: Civil Litigation is authorised to perform such function as may be performed in accordance with the law, practice or custom by legal practitioners, notaries or conveyancers for or on behalf of any O/M/A's in the Republic of Namibia.

2.4.3 The Government Attorney's Office may also –

- (a) perform legal services for statutory bodies in which the Government has financial or other interests;
- (b) act on behalf of officials, staff members and employees of the Government Attorney's clients in which civil and criminal cases arising from the performance by these persons of their official functions;
- (c) institute civil actions on the instructions of a client or on behalf of an official, staff member or employee who is or was wronged or injured while performing his/her official duties;
- (d) recover damages or losses caused to the State from any person in terms of section 11 of the State Finance Act, 1991 (Act No. 13 of 1991) read together with the provisions of Paragraph E of the Treasury Instructions;

- (e) collect on behalf of its clients, any debt owed to the State in terms of the provisions of Paragraph EC000 of the Treasury Instructions; and
- (f) negotiate settlement(s) on behalf of its clients in connection with any claim instituted against the State in accordance with the provisions of Paragraph EC000 of the Treasury Instructions.

2.4.4. Considering the function of the Government Attorney’s Office one can analyse the good work done by the office by considering the types of cases the Office is seized with and the successful, timeous handling of those cases.

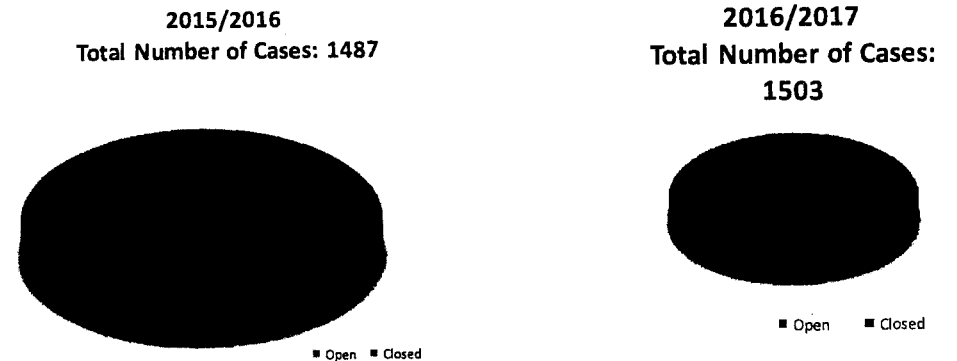


2.4.5 As seen from the chart above, the Directorate: Civil Litigation is mainly seized with Motor Vehicle Accident claims. The second largest area of law in which the legal officers specialize is in the field of labour law. Cases dealing with damage to Government property have increased as the State Finance Act, 1991 read together with the Treasury Instructions are more strictly applied. The collections related to

these cases have not been dealt with and, as seen, collections for 2016/2017 are significantly lower than in 2015/2016 when the Directorate: Civil Litigation collected N\$ 3, 139, 866. 16. It is anticipated that the collections will be completed in the 2017/2018 budget year and reflect favourably in the next budget analysis.

- 2.4.6 Directorate: Civil Litigation has dealt with a number Supreme Court cases such as:
- (a) De Wilde MC v Minister of Home Affairs (SA 48-2015) [2016] NASC (23 June 2016);
 - (b) Kamahere v Government of the Republic of Namibia (SA 64-2014) [2016] NASC (19 August 2016);
 - (c) Minister of Finance v Merlus Seafood Processors (Pty) Ltd (SA 91-2011) [2016] NASC (30 September 2016);
 - (d) Medical Association of Namibia and Another v Minister of Health (SA 80-2013) [2017] NASC (9 February 2017); and
 - (e) President of Namibia v Anhui Foreign Economic Construction Corporation Ltd (SA 59-2016) [2017] NASC (28 March 2017).

2.4.7 Many of the cases which the Directorate deals with span over several years and cannot be closed during a budget year.



2.4.8 The number of cases which the Directorate: Civil Litigation dealt with in 2016/2017 has increased from 1487 to 1503 cases. Although less cases were closed in 2016/2017 compared to 2015/2016, there were more complex matters which the Directorate had to deal with and considering that most of the matters dealt with are Motor Vehicle Accidents and Labour matters it is inevitable that such matters are open for longer than one budget year.

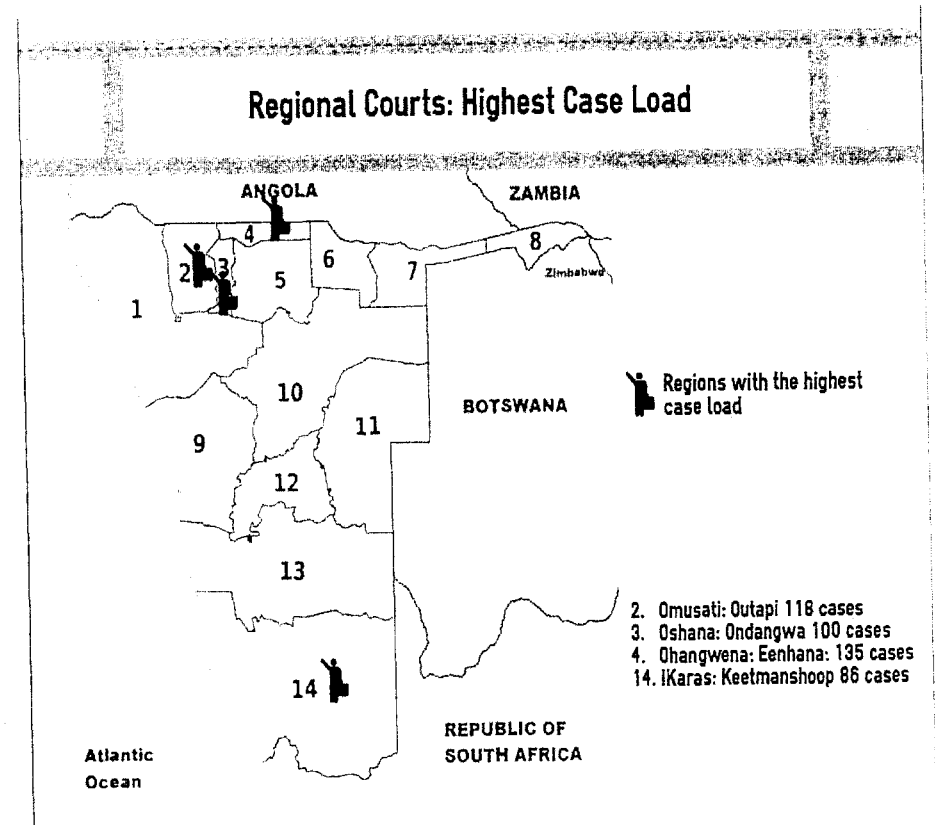
2.5 Directorate: Public Prosecutions

2.5.1 The Prosecutor-General’s Office is faced with challenges in three main areas of litigation namely, human trafficking, poaching and domestic violence. To ensure that the prosecutors are equipped to deal with such matters partnerships have been established with international partners to provide prosecutor training.

2.5.2 United Nations Office on Drugs and Crime (UNODC) is involved in training prosecutors in investigating and prosecuting human trafficking. United Nations Children’s Fund (UNICEF) teaches prosecutors how to treat child witnesses and the American Embassy in Namibia trains junior staff members in the field of general investigation of crimes such as drug trafficking.

2.5.3 During this budget year the finalization rates of cases were very low. Out of 19 551 cases in the Magistrates’ Courts only 4661 were finalised. While only 82 of the 958 cases in the Regional Courts were finalised. There are enormous volumes of work which must be completed by a relatively small staff complement. As indicated in the image below, the most cases appear on the roll for Eenhana, Outapi, Ondangwa and Keetmanshoop.

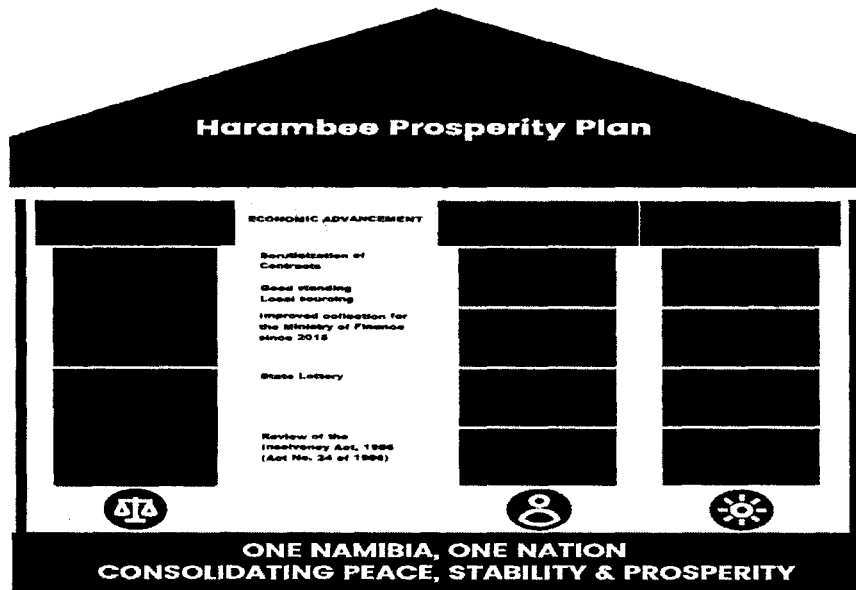
59% of the finalised cases in the Regional Courts were for convictions, 23% withdrawals, 10% acquittals and 7% discharges in terms of Section 174 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).



3. Harambee Prosperity Plan

- 3.1 The Harambee Prosperity Plan (HPP) unveiled by His Excellency, the President in 2015 requires each O/M/A to act transparently and to provide high performance and citizen-centered service delivery. The HPP plan states that the Attorney-General must provide a check list for policy and law making process and strict adherence thereto.
- 3.2 In accordance with this instruction the Attorney-General has developed administrative directives and drafted a new cabinet handbook which awaits approval.
- 3.3 However, the Office of the Attorney-General is much more involved in the successful implementation of the HPP as indicated in the HPP structure below.

HPP STRUCTURE



3.4 On 12 April 2017, while delivering his State of the Nation Address, His Excellency, the President said as follows:

“The valuable lessons learnt have been incorporated into our approaches and processes. After all, Government is and must remain adaptable to change and responsive to new ideas. In order to reap the full potential of our country, each of us needs to sow with hard work. There is a need for all of us to rededicate ourselves to more responsive implementation. It is for this reason that I have declared the year 2017 as the Year of Rededication.”¹

3.5 Therefore, as seen from the HPP Structure above, the Office of the Attorney-General undertakes to continually dedicate itself to the realization of every pillar of the HPP Structure through timely, provision of legal advice and representation to ensure that justice is served and the Namibian Constitution is protected and upheld.

¹ His Excellency, Dr. Hage Geingob, President of the Republic of Namibia delivering the *State of the Nation Address* on 12 April 2017 Parliament, Windhoek, Namibia.

4. **Summaries of Selected Key Cases handled in the High and Supreme Courts**

4.1 ***Arandis Power (Pty) Ltd v The President of the Republic of Namibia* (A 26-2016) [2016] NAHCMD 194 (7 July 2016)**

4.1.1 This was an urgent application brought in 2016 challenging the awarding of a tender by NamPower to Xaris Energy (Pty) Ltd.

4.1.2 The application was brought in the High Court by Arandis Power against the President of Namibia, the Minister of Mines and Energy, Nampower, Xaris Energy (Pty) Ltd and Sinohydro Corporation Limited. All Government Respondents opposed the application and on 7 July 2016 judgment was with the application being dismissed with costs.

4.1.3 The Applicant has appealed the decision of the High Court to the Supreme Court and remains pending.

4.1.4 Due to the national importance of the project for which the tender was awarded, Government has written to the Registrar of the Supreme Court for an accelerated allocation of a hearing date.

4.2 ***New Era Investment v Ferusa Capital Financing Partners* (HC-MD-CIV-MOT-GEN-2016-00342) [2016] NAHCMD 380 (02 December 2016)**

4.2.1 Ferusa Capital Financing Partners was awarded a tender by the Ministry of Urban and Rural Development for the completion of the houses that were commenced, but not completed under the mass housing development program in April 2016. Ferusa

Capital subcontracted New Era Investment (and issues relating to payment of the subcontractor Aros). Ferusa now want to evict New Era from the construction site. The Ministry is cited as an interested party and therefore Government has not oppose the application. However, if Ferusa's application fails, the Ministry will have to take legal action against Ferusa to ensure continuation of the project.

4.3 ***Government of the Republic of Namibia v LM* (SA 49-2012) [2014] NASC (3 November 2014)**

4.3.1 These matters were heard in the Supreme Court on the 17th of March 2014. These cases concerned very technical legal principles such as patient autonomy, specific Constitutional rights and contractual principles.

4.3.2 Patient autonomy requires that a person has the right to be informed about the procedure he or she must undergo and what the consequences of the procedure entails so that an informed decision can be made. The converse thereof is that once the person has signed a contract and has given his or her permission in writing to undergo the specific procedure that is sufficient in law to permit a medical officer to undertake the procedure. One must consider the specific facts of each case.

4.3.3 Although Government was not successful on appeal, it was reaffirmed that the Plaintiffs were not sterilized as a result of their HIV status and that claim was dismissed in the High Court. Most of these matters have been settled.

4.4 ***Minister of Finance v Merlus Seafood Processors (Pty) Ltd* SA 91/ 2011**

4.4.1 This was a review application in the High Court which was also taken on appeal. The legal principle of concern is that a decision by any administrative body remains valid, irrespective whether it is right or wrong, until it is set aside by a competent court. In

this regard the Supreme Court adopted the reasoning in the *Onde Kraal* case decided by the Constitutional Court of South Africa.

4.5 *Anhui Foreign Economic Construction Group Corporation Ltd v Minister of Works and Transport & 4 Others (Case No: A 21/16)*

4.5.1 The Government argued in the High Court that the Permanent Secretary of the Ministry of Works and Transport did not have authority to have awarded the tender. The Government was vindicated in the Supreme Court, and argued successfully that the conduct was unreasonable and invalid. The High Court found that the decision to award did not constitute an award and this was overruled by the Supreme Court.

4.5.2 The result of the Supreme Court judgment is that at present there is no award. An internal procurement process had been followed by the Namibia Airports Company (NAC) which requires either that confirmation at policy level should be obtained or ceased altogether and started afresh. The fact remains that the airport must be upgraded and expanded.

4.6 *LP Litota // Minister of Safety & Security I 2711/2014*

4.6.1 This case is about a claim brought against the police for unlawful arrest and detention. The applicant claimed N\$ 50 000.00, but was unsuccessful in his claim. The Government successfully defended the matter and obtaining a cost order of N\$ 53 000.00 in their favour.

4.7 *The Medical Association of Namibia Limited & Another // The Minister of Health and Social Services and 3 Others Case No. SA 80/2013*

4.7.1 The applicants considered the constitutionality of certain provisions of the Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003) which prohibited

medical practitioners, dentists and veterinarians who do not hold licences issued in under the Medicines and Related Substances Control Act, 2003 from selling certain scheduled medicines. They also challenged the constitutional validity of section 31(3) which authorised the Namibia Medicines Regulatory Council to issue licences permitting medical practitioners to sell Schedule 1, Schedule 2, Schedule 3 and Schedule 4 substances to their patients, if the Council was "satisfied that granting such a licence was in the public need and interest and that the medical practitioner, the dentist or the veterinarian has the required competence to dispense those scheduled substances."

4.7.2 The Supreme Court found the licensing scheme of the Act void for vagueness and declared unconstitutional and invalid the words requiring a medical practitioner, a dentist or a veterinarian to hold a licence "contemplated in section 31(3)" in order to sell any of the said scheduled substances and severed the words from of the Act. Section 31(3) itself was declared to be of no force and effect.

4.7.3 The Court however rejected the applicants' contention that "they should be free to sell scheduled medicines without any regulation." The court acknowledged that:-

"There is a legitimate governmental purpose to regulate dispensing of medicine to prevent irrational dispensing practices and to avail safe and efficacious medicine to as many people as possible at affordable prices."

4.7.4 The court further declared that:

"Government's concern about some doctors' dispensing practices constituting up to 80% of their medical practices is not an unreasonable one. Regulation aimed at striking a balance between dispensing and a doctor's clinical practice is, in my view, a legitimate governmental purpose."

4.8 *Alfred Mew Visser v Minister of Finance, Motor Vehicle Accident Fund, Europcar and Attorney-General A 89 2014*

4.8.1 The appellant who was 16 years old at the relevant time, was riding a motorcycle when he was involved in an accident with a motor vehicle driven by a German national visiting Namibia. The motor vehicle had been leased from Europcar by the German national. The collision occurred on 28 November 2004. The appellant claimed that the collision was solely caused by the negligence of the German national. In his main claim the appellant also attacked the constitutional validity of section 10(2) of the Motor Vehicle Accident Fund, of 2001 (Act 4 of 2001) and the regulations, promulgated under it in Government Notice 5 of 2003 and published in Government Gazette No. 2893, on several grounds. He alleged, amongst other things, that section 10(2) of the Motor Vehicle Accident Fund Act, 2001 and the Regulations were in conflict with Articles 8 on dignity and 10 on equality of the Namibian Constitution; that it violated his right "to have his case determined by an independent, impartial and competent court of law". The powers of the Minister of Finance under section 10(2) were tantamount to an impermissible delegation of power to legislate; and that the Regulations were *ultra vires* the powers given to the Minister by the Act.

4.8.2 In respect of the main claim, appellant prayed for damages against the Motor Vehicle Accident Fund ("the Fund") in the sum of N\$ 9, 081, 281.00 and a declaration that section 10(2) of the Act and the Regulations were unconstitutional. Section 10(2) of the Act provided as follows:

"the Minister, on the recommendation of the Board, may by regulation, provide in such cases and on such basis as he or she may stipulate –

- (a) the different categories or heads of damages or loss under which compensation is payable under subsection (1);
- (b) impose limitations on the liability of the Fund to pay compensation under any of the different categories or heads of damages or loss referred to in paragraph (a)."

4.8.3 The Regulations limited the liability of the Fund to compensate victims of motor vehicle accidents. The appellant attacked the constitutional validity of section 10(2) and the regulations because the limitations imposed on the Fund's liability would affect the amount of compensation he would be able to claim from the Fund.

4.8.4 The issues pertaining to the validity of section 10(2) of the Act and the Regulations were dealt with as points *in limine*. In respect of these issues, the appellant was unsuccessful in the High Court and appealed to the Supreme Court. In the Supreme Court the appellant's challenge was based on the grounds mentioned above except that he abandoned the contention that his right to have his case determined by an independent, impartial and competent court of law was violated by the impugned legislation.

4.8.5 In the Supreme Court the constitutional challenges were again unsuccessful as that Court held that both the Motor Vehicle Fund Act, 2001 and the Regulations were not contrary to the provisions of Articles 8 and 10 of the Namibian Constitution.

End.